No. 22,152

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOLLY SUGAR CORPORATION, APPELLANT

v.

DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, et al., APPELLEES

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT

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I

JURISDICTION

This case is before the Court upon the appeal of Holly Sugar Corporation (hereinafter sometimes referred to as "Holly" or the "Company"), from an order of the District Court of the United States for the Northern District of California (Lloyd H. Burke, J.), granting the motion of appellee Distillery, Rectifying, Wine and Allied Workers International Union, AFL-CIO, et al. to confirm an award of Arbitrator Robert E. Burns issued on January 23, 1967 and denying appellant's motion to vacate this award.

Appellant respectfully submits that the district court erred (i) by granting appellee's motion to confirm the Arbitrator's award; and (ii) by failing to issue an order granting appellant's motion to vacate and set aside the award. The jurisdiction of the Court is invoked under 28 U.S.C. 1291 and 1294.

II

STATEMENT OF THE CASE

A. The Collective Bargaining Relationship Between the Unions and the Company.

As set forth in the record on appeal, the basic underlying facts of this case are virtually undisputed.

Although there were conflicts in the testimony presented in the arbitration hearing, the Arbitrator found it unnecessary to resolve some of these conflicts. These areas of unresolved conflict are not relevant to the determination of this appeal. The Arbitrator's opinion and award is, of course, part of the record before the Court (R. 47-62).[1/]

For many years Holly Sugar Corporation has joined with two other corporations, American Crystal Sugar Company and Spreckels Sugar Company, in a multi-employer bargaining unit for the purpose of negotiating collective bargaining contracts with the unions representing the companies' employees at their factories in California. The three sugar companies which comprise the multi-employer bargaining unit are the major producers of beet sugar in California. The

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1. All citations designated "R" are to the transcript of record before the Court which is numbered from Page 1 through Page 229 consecutively. In addition, the transcript compiled in the arbitration hearing is also part of the record and is separately numbered. References to this document will be preceded by the designation "Arb. Tr." Included in the record is a transcript of the argument before the District Court which is also separately numbered. References to this document will be preceded by the designation "Ct. Tr." The current collective bargaining agreement between the parties is also part of the record and appears as Exhibit A to the complaint (R. 12). The current contract is contained in a blue-bound booklet which is separately numbered. For the convenience of the Court, citations to the current contract will be cited both to the record and to the page in the booklet on which the cited material appears e.g. (R. 12 [55-59]).

current agreement, effective from March 1, 1965 to March 1, 1968, covers five factories of Holly Sugar Corporation, four factories of Spreckels Sugar Company and a single factory of American Crystal Sugar Company. The employees at each factory are represented by separate local unions, each of which is affiliated with the United Sugar Workers Council of California and with the Distillery, Rectifying, Wine and Allied Workers International Union, AFL-CIO (hereinafter sometimes referred to as Distillery Workers). The prior collective bargaining agreement, effective from March 1, 1962 to March 1, 1965, covered five factories of Holly Sugar Corporation, three factories of Spreckels Sugar Company and a single factory of American Crystal Sugar Company (R. 13). During the term of the 1962-65 contract, Spreckels Sugar Company built an additional factory at Mendota, California, which was subsequently organized by the Union and thereafter included under the current contract.

Both the current and prior agreements contain, in the main, identical provisions applicable to all the factories of the three companies. However, each contract contains a separat listing of job classifications and wage rates for each of the factories covered by the agreements. Although the process used to produce sugar from sugar beets is fairly standardized, a review of the job classifications and rates discloses that

the number of job classifications and even the wage rates assigned to particular classifications vary significantly from factory to factory.[2/] The master agreement in "Section I-C, Coverage and Recognition" provides that the respective companies recognize each of the local unions as the "sole representative" of the employees at the particular factory (R. 12 [4-5]). Furthermore, Section XVIII provides that:

> "Unless otherwise herein specifically provided, this agreement shall be interpreted and administered as between the Employer and each of the respective unions constituting the first party hereto, in the same manner that said agreement would be interpreted and administered if the terms and conditions of the agreement were incorporated in separate agreements entered into between Employer and each of the respective Unions; and the obligations of the individual employers signing this agreement shall be several and not joint." (R. 12 [33]).

The preceding contract contained identical provisions (R. 13-14, 30).

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2. For the convenience of the Court, attached to this brief as Appendix A is a compilation, in summary form, of particular work classifications of a similar or identical nature applicable to separate factories of one or more of the three members of the multi-employer bargaining unit which are paid at different wage rates.

The mechanics of this system of separate agreements between the employers and the local Unions is clearly pointed up with regard to the subject now in dispute, i.e., the work classification and applicable wage rates for painting at the various factories of the three companies. The predecessor contract, 1962-65, provided as follows:

(1) The portion of the contract containing the work classifications and wage scales for American Crystal Sugar Company's Clarksburg factory did not contain a "Painter" job classification (R. 37).

(2) The portion of the master contract containing the work classifications and wage rates for all five Holly Sugar Corporation California factories did not contain a work classification or wage rate for a "Painter" (R. 38-39).

(3) The work classification and wage schedules applicable to the Spreckels and Woodland factories of the Spreckels Sugar Company contained a "Painter" work classification in the Technicians Group A category (the highest rate applicable to bargaining unit employees). The work classification and wage scale applicable to Spreckels' Manteca factory contained a work classification entitled "Painter, Head" in the Technician A category (R. 40-42).

The current master agreement, 1965-68, provides as follows with respect to painting work:

(1) The portion of the master contract applicable to American Crystal Sugar Company is unchanged; it does not contain a Painter classification.

(2) The practice under the predecessor contract of combining all five factories of the Holly Sugar Corporation under one work classification and wage schedule has been discontinued. Each of the five factories has a separate work classification and wage rate schedule. All the Holly factories list a work classification of "Painter (Spray Gun Only)" at the Technician A wage rate.

(3) The portions of the master contract dealing with the work classification and wage rate schedules for "Painter" at the Spreckels, Woodland and Manteca factories of the Spreckels Sugar Company are unchanged. A work classification and wage rate schedule for the new Mendota factory has been added containing a "Painter" classification, Technician A.

B. The 1965 Contract Negotiations

1. The Unions' Demand for Painter Classification and the Company's Rejection of the Demand.

It is undisputed that the above described changes applicable to work classifications and wage rates for the

Holly Sugar Corporation factories, including the factory involved in this grievance at Carlton, California (also known as the Brawley factory), came about as the result of the contract negotiations conducted in the spring of 1965. In addition, there is no material dispute as to the manner by which the "Painter (Spray Gun Only)" job classification for the Holly Sugar Corporation factories was added to the contract.

In March 1965, the negotiations between the companies and the Unions with respect to the provisions of the master contract were temporarily adjourned, to permit discussion of the Unions' job classification demands on a company-wide rather than an industry-wide basis. Subcommittees composed of representatives from each Local Union of the respective companies and Company officials, met to discuss various classification demands. The Holly classification subcommittee considered the Local Unions' demand that a classification of "Painter" be included in the contract for all Holly factories (Arb. Tr. 51, 54, 58, 138, 238). Among the Union representatives on this subcommittee were Mr. William Duncan, then president of Local 174, and Mr. Sam Hickenbottom, both from the Holly Carlton factory.[3/]

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3. (Tr. 55, 195, 255.) At the arbitration hearing an

At the behest of the representatives from the Holly Santa Ana factory, the Locals submitted a demand for a Painter classification at the Technician A rate. At subcommittee meetings held on March 11 and 25, 1965, the Company representatives rejected the demand for a Painter classification (R. 54; Arb. Tr. 138, 239). The Company's chief negotiator, Guy Rorabaugh, Vice President of Operations, objected to the demand for a Painter classification on the ground that the Company's policy consistently had been to have year-round employees perform painting as needed during intercampaign.[4/] Mr. Rorabaugh also objected to the

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(footnote 3 cont'd)

immaterial unresolved dispute arose as to the identity of the chief spokesman for the Union representatives at the subcommittee meetings. Company witnesses testified that Mr. Duncan of Carlton was the chief spokesman for the Union at the subcommittee meetings. The Union witnesses disputed this, stating that Mr. Kelly of Santa Ana was the chief spokesman and that Mr. Duncan had little to say about the "Painter" classification. (Compare Arb. Tr. 141, 239-41, 250 with Arb. Tr. 187, 195-96, 211.) There is no dispute, however, that Local 174 of the Carlton factory had two representatives present at all of the subcommittee negotiations.

4. (R. 52) The beet sugar industry uses an unusual terminology to describe the seasonal operations. The operating periods during which beets are harvested and processed into sugar are called "campaign." The non-operating periods are known as "intercampaign." Seasonal employees who work primarily during the processing period or campaign are designated as "campaign

establishment of a Painter classification on the basis that the Company did not want jobs included in the work classification schedule which were not being filled. However, if the occasion arose when a full time painter was needed, such a classification would be established.[5/]

After the Company rejected the Locals' demand, based in part on the negotiators' belief that there were no employees assigned painting work on a full time basis, the Union representatives thereafter notified the Company that at that time two men were currently engaged full time in

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(footnote 4 cont'd)

employees." Those employees who generally work during both campaign and intercampaign periods are known as "year-round" employees. During intercampaign nearly all campaign employees are laid off. During the intercampaign period the remaining year-round employees, most of whom occupy operating positions during campaign, are assigned to repair and maintain the equipment, machinery and premises, the primary task being to prepare the factory for the next processing period.

5. At the arbitration hearing Mr. Rorabaugh denied that he stated that such a job would be established if the occasion arose when a full time painter was needed (Arb. Tr. 242, 246). This testimony was supported by his aide in negotiations, Mr. Hanes, General Manager, Industrial Relations (Arb. Tr. 140, 220). However, the Arbitrator in his award apparently made a finding of fact that such a statement was made (R. 54-55).

painting at the Santa Ana factory (Arb. Tr. 186-87, 239-40). Notwithstanding this claim, the Company continued to reject the demand for a Painter classification (R. 54; Arb. Tr. 138, 239).

2. Counterproposal for a Spray Painter Classification.

At the March 25, 1965, subcommittee meeting, the Company again rejected the Unions' demand for a Painter classification. Thereafter, a counterproposal was made for a Spray Painter classification to be placed in the contract.[6/] The Unions demanded that a Technician A wage rate be paid to an employee performing such work (Arb. Tr. 141, 145). The chief argument advanced for the creation of a Spray Painter classification was that the work was messy, hot, required the use of a mask, and was generally an uncomfortable and unpleasant task to perform, especially when contrasted to brush or roller painting (Arb. Tr. 250).

Initially, the Company accepted this proposal upon

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6. Again an unresolved dispute arose at the hearing regarding which party first proposed an additional work classification for spray painters. Each party claimed the other first proposed the more limited classification in order to compromise the deadlock. (Compare Arb Tr. 53, 188, 208 with Arb. Tr. 141-42, 145, 239-240.) Obviously, the identity of the party who first proposed the compromise is immaterial.

the condition that the rate be paid only for spray painting work performed in excess of four hours in a day (R. 54). At this juncture, the International Representative of the Distillery Workers, and chief negotiator for the master contract, Mr. Kyle Dickinson, entered the discussion. He objected to the requirement that employees "must work as spray painters for four hours" in order to receive the agreed upon rate. This restriction was unacceptable to Dickinson because he claimed it would afford the Company an opportunity to "chisel" on the higher wage rate by scheduling employees for less than four hours per day on spray painting (Arb. Tr. 54, 56-57).

3. The Final Compromise and Settlement.

The Company acceded to Dickinson's objection to the "four hour" requirement. Thereafter, the Company accepted the Locals' proposal that an employee would be paid at the Technician A wage rate "while a man is on spray painting only" (Arb. Tr. 240). At the next bargaining session on the master contract, the Unions' demand for a Painter classification at the Holly factories was dropped and the Company's last offer was accepted, i.e., the four hour limitation was eliminated and it was agreed that the wage rate was to be paid "while a man is on spray painting only." As a result of the compromise reached during the

1965 negotiations, a work classification of "Painter (Spray Gun Only)" at the Technician A wage rate was included in those portions of the master contract applicable to all five Holly factories in California, including the Carlton factory (R. 54-55).[7/]

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7. (R. 12 [43, 45, 49, 52, 56]) In this connection, it should be noted that Section XX of the current master contract provides:

> "This contract is in full settlement of the Union's proposals and the Employer's counter-proposals respecting the March 1, 1965 opening, and this new contract and the present pension contracts between the Union and American Crystal Sugar Company, and Holly Sugar Corporation, and Spreckels Sugar Company, as extended by Section XV hereof, shall constitute the full understanding of the parties and settlement of the March 1, 1965 opening.
>
> This contract and the foregoing pension agreements shall not be openable for any purpose or on any matter prior to the date of expiration.
>
> IN WITNESS WHEREOF, the parties hereto have executed this agreement by their respective officers duly authorized so to do, as of the day and year first hereinabove written.
>
> . . . .
>
> LOCAL NO. 174 (Brawley)
> By Wm. A. Duncan
>
> . . . ." (R. 12 [34-35].)

As the Arbitrator noted in his opinion, the testimony at the hearing was in conflict with regard to the work for which an employee was to be paid the Technician A rate (R. 55). Mr. Rorabaugh and Mr. Hanes, the Company's negotiators, testified the agreement reached was that an employee would be paid the spray painting rate only when he was preparing the spray gun, using it, and cleaning it up. These witnesses testified that the preparation of suf-faces prior to spray painting was clearly understood by the parties as not included within the job. The Company contended at the arbitration hearing that the Union was attempting to expand the compass of the agreed upon Technician A rate for Painter (Spray Gun Only) to the work of preparing surfaces for spray painting (Arb. Tr. 145, 241-42).

On the other hand, the Unions' witnesses' version of the agreement reached at the 1965 negotiations was quite the opposite, The Unions' witnesses asserted that the parties had not reached agreement, and had not even discussed the rate to be paid for the preparation of surfaces prior to spray painting (Arb. Tr. 190, 193-94, 200-01, 204, 209). In his opinion and award, the Arbitrator concluded, inter alia, that the preparation of painting surfaces was covered because such work is normally

performed as an adjunct to spray painting (R. 59-61).

C. The Employment History of Harold Zimmer at Holly's Carlton Factory.

From the time the Carlton factory first began operations in 1948, maintenance painting had been required. Such painting was generally done during intercampaign by "year-round" employees (R. 52).

Early in 1964, more than a year prior to the execution of the current contract, the Superintendent of the Carlton factory, R. B. Scanlan, decided to hire an employee to do painting. After the grievant, Harold M. Zimmer, called on Superintendent Scanlan in March of 1964 seeking employment, he was hired and assigned to painting work (ibid). At the time of Mr. Zimmer's employment, the master contract applicable to the Carlton factory did not list a painter job classification (R. 38-40, 52). Mr. Zimmer was classified as a Mechanic's Helper, a Station Group A wage rated job (R. 39).[8/] The Mechanic's Helper work classification is a flexible classification, and employees so classified perform a variety of maintenance jobs under the supervision of employees in higher

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8. The full title of the work classification at that time was "Oiler and Mechanic's Helper." The classification is designated as "Mechanic's Helper" under the current contract (R. 39, 12 [57]).

classifications (R. 52-53).

From March 1964, Mr. Zimmer was continuously employed at the Carlton factory, except for a two-month layoff in October-November 1964. Until approximately June 1, 1966, Zimmer devoted all his time to painting of various types including brush, roller, and spray gun painting. During this time, he painted equipment and both the inside and the outside of factory buildings and houses owned by the Company. While Mr. Zimmer was painting, he spent about 65% of his time spray painting and in the preparation of surfaces for spray painting.[9/] The balance of his time was spent brush or roller painting and in the preparation of surfaces for this painting (R. 52-53)

From March 1964 through February 28, 1965, Mr. Zimmer was paid in accordance with the work classification to which he had been assigned, i.e., Mechanic's Helper at the Station A rate. After the current contract became effective on March 1, 1965, Zimmer was paid the Technician A rate whenever he was engaged in preparing the spray gun equipment, using the equipment, and cleaning it after use.

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9. One of the major projects assigned Mr. Zimmer was changing the basic color scheme of the factory buildings from aluminum to pastel shades (Arb. Tr. 113).

He was not paid that rate, however, for preparing surfaces to be spray painted; nor was he paid at that rate for painting or preparing to paint with a brush or roller. Zimmer was paid in this fashion until approximately June 1, 1966, when he was assigned to other work because the Company had fairly well completed its painting program (R. 53-54).

During this period, Zimmer did not file any grievance concerning the classification to which he was assigned, the nature of his work assignments, or the rate at which he was being paid (R. 54). Zimmer did, however, complain to Factory Manager Scanlan in approximately December 1964 or January 1965 and to Foreman Clark in February 1966. At those times, Zimmer claimed that the rate at which he was being paid was too low for the work which he was performing. He also registered a similar complaint with Local Union President Duncan in Spring 1965. Subsequently, in December 1965, at President Duncan's suggestion, Zimmer began to keep a record of his painting activities. Thus, as the arbitrator found, the Union had actual knowledge of Zimmer's full time painting throughout the period of his employment (R. 55; see Arb. Tr. 33, 38-39, 41, 45-46, 168-69).

D. The Grievance.

As a result of an election in January 1966, E. J. Neff was elected President of Local 174 at Carlton,

thus deposing William Duncan. On assuming the presidency of the Local, Mr. Neff was presented with a variety of grievances, including a complaint by Mr. Zimmer that he was not receiving a wage rate commensurate with his work tasks (Arb. Tr. 84). Based on Zimmer's complaint, the Union met with local Company officials on February 23, 1966 to discuss the existing pay practice for painting work. At this meeting, the Company officials explained that, in accordance with the Company's understanding of the agreement reached in negotiations as embodied in the collective bargaining contract, they were paying the Technician A rate to employees while they were actually spray painting, and while they were preparing and cleaning the equipment (R. 45).

On April 17, 1966, the Union filed a grievance charging that the Company had violated Sections X-C and X-D of the collective bargaining contract. The grievance stated inter alia:

> "[T]he Company is in violation of the current agreement by the abuse of Paragraph 'C' of the agreement which deals with the provision of 'Temporary Transfer'." (R. 46.) (Emphasis added.)

The grievance further stated:

> "It is the contention of this Union that, the assignment of the position of 'mechanic's helper' does not, in any way, reflect the true classification that should presently be assigned

to the incumbent painter. It is common knowledge that approximately ninety percent of his endeavour is within the scope painting and that a percentage of that time falls within the classification of 'Spray Painter'. Therefore, it is contended that there is an abuse of the aforementioned paragraphs of the current agreement and it is desired that the position of 'Spray Painter' be properly posted and filled at this time." (Ibid, emphasis added.)

Following the filing of this grievance, on May 2 and 3, 1967, the parties held a two-day grievance committee meeting. At these meetings, the Union sought to expand the grievance to include a demand that the classification of Painter be established at Carlton. The Company rejected this demand on the basis that the 1965 negotiations had disposed of an identical demand, and, therefore, the matter was not arbitrable (R. 51-52). As the parties were thus unable to resolve the matter, it was agreed the matter should proceed to arbitration, although the Company maintained the dispute was not a proper subject for decision and award (R. 52). Accordingly, Arbitrator Robert E. Burns, Esq., San Francisco, California, was selected as arbitrator to hear the matter (R. 46; Arb. Tr. 60-61, 149).

E. The Arbitration Proceeding.

An arbitration hearing was held in San Francisco, California, on July 12, 13 and 29, 1966. At the outset of the hearing, the Arbitrator stated that the matter was

being considered held under the current contract.[10] This statement was nothing more than a recognition of the specific limitation upon the Arbitrator's authority as set forth in the collective bargaining agreement.[11]

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10. The Arbitrator stated: "This is an arbitration proceeding pursuant to a Collective Bargaining Agreement between Holly Sugar Corporation and others and Distillery, Rectifying, Wine and Allied Workers International Union, AFL-CIO and United Sugar Workers Council of California, the Agreement being dated May 28, 1965." (Arb. Tr. 3.) (Emphasis supplied.)

11. (R. 12 [25-27]) For the convenience of the Court, the grievance and arbitration provisions of the master agreement (Section XI) are set forth in Appendix B to this brief. In brief, Section XI provides the following limitations with respect to the resolution of grievances under the contract:

> "All grievances must be presented to Employer in writing, setting forth in detail the nature of the grievance and must be presented within thirty (30) days of the date of the alleged grievance. Otherwise said grievance will not be considered.
>
> . . . .
>
> . . . Either the Union or Employer may, after exhausting the foregoing grievance procedure, submit any unresolved grievance which arose and was presented during the term of this contract and which concerns the interpretation and application of any of the terms or provisions of this contract to an arbitrator for decision in accordance with the following procedure:
>
> . . . In any case, when the Union or Employer refers to arbitration an unresolved grievance which was presented in accordance with the above procedure, the arbitrator who

At the arbitration hearing, the Union through its counsel, sought to expand the grievance by requesting as relief that the Company be required to establish a new job classification of Painter under the current master contract. At the hearing, Company counsel from the outset took the position that the Union's request for the establishment of a Painter classification was beyond the authority of the Arbitrator under the contract. Thus counsel for the Company stated:

> "But the Company's position in summary is that this position of the Union is not arbitrable because it is proposed to add something to the Contract or modify the Contract or change the Contract in a respect which was disposed of in negotiations. The question of adding a painter's classification was discussed in negotiations,

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(footnote 11 cont'd)

> shall hear such grievance shall be selected by lot from the foregoing panel. . . .
>
> It is understood and agreed, however, that proposals to add to or change this contract shall not be arbitrable and that no proposal to modify, amend or terminate this contract may be referred for arbitration under this Section; and no arbitrator shall have any power to amend or modify this contract, except that in the event new jobs are created, the arbitrator shall in such event have the power to act as provided in Section XVII, subparagraph 2, of this contract." (Emphasis added.)

was rejected by the Company; and the Company's position is that under the terms of Section XI of the grievance procedure, the Arbitrator has no power or authority to modify, change or add to the terms of the Contract; and therefore that any proposal, whether it be in the form of a grievance or not, to add the classification of painter is beyond the scope of the arbitrator's authority." (Arb. Tr. 6, ll. 1-12.)

Company counsel also urged at the hearing that the Union's attempt to expand the scope of the work to be covered by the job classification "Painter (Spray Gun Only)," as agreed to by the parties in negotiations, constituted a further attempt by the Union "to amend the contract." (Arb. Tr. 15.)

In light of the objections made by Company counsel to the authority of the Arbitrator to consider the Union's claims, and in view of the fact, as the Arbitrator noted, that it would be virtually impossible to rule upon the Company's objection without the taking of testimony, it was agreed that the hearing would proceed without prejudice to, and without the Company waiving, its basic objections that the Union's claims primarily involved attempts to obtain by arbitration what it had been unable to obtain at the negotiating table, thereby violating the express restriction in the grievance provision of the contract "that no proposal to modify, amend or terminate this contract may be referred for arbitration under this Section."

Following the three-day hearing, the Arbitrator issued his opinion and award on January 23, 1967. In his decision, the Arbitrator made the following award:

> "1. The company violated the master contract by failing or refusing to establish a Painter work classification and by refusing to post and fill the Painter (Spray Gun Only) work classification.
>
> 2. The issue with respect to the establishment of the Painter work classification under the 1962 contract is arbitrable at this time under the provisions of the 1962 contract and the issue with respect to the Painter (Spray Gun Only) is arbitrable under the 1965 contract.
>
> 3. Grievant Zimmer is entitled to back pay from the date of his employment in March 1964 for the period while he worked as a Painter or a Spray Gun Painter or both computed upon the difference between the Technicians Group A rate of pay and the pay which grievant Zimmer actually received while working as a Painter or Spray Gun Painter." (R. 61-62.)

With respect to his first determination, the Arbitrator concluded, contrary to the Company's contention and the testimony of its witnesses, that the preparation of surfaces for spray painting was included within the job classification "Painter (Spray Gun Only)." He further concluded that since the "majority of his [Zimmer's] work was as a spray painter, including the preparation of surfaces, . . . he is entitled to be classified and paid as a Painter (Spray Gun Only) from March 1, 1965, forward for the period when he performed this work" (R. 61).

The Arbitrator based the aspect of his award which requires the establishment of a new position of Painter to be compensated at the Technician A rate upon his determination that in the assignment of Zimmer to painting in March 1964 the Company had, in effect, established a new position. The Arbitrator further held that the Company had violated Sections XVII-2 and VIII-G of the contract in March 1964 by assigning Zimmer to painting work without negotiating with the Union with respect to the creation of a new job classification of Painter.[12/]

Although acknowledging that both Zimmer and the Union had full knowledge of the nature and extent of Zimmer's painting activities from the time of his hire, the Arbitrator held that he was not barred from granting a remedy under the old contract because the Company had not, at the time of Zimmer's hire, posted a new job of Painter and, therefore, "both the 30-day limitation of the 1962 contract and any other limitation were tolled." In reaching

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12. In the Arbitrator's opinion, some confusion may result from several typographical errors. In his opinion, the Arbitrator refers to "Article VII-G" (R. 56), and twice refers to "Section X-G" (R. 57). These references are in error and obviously were intended to refer to Section VIII-G of both the predecessor and the current master contracts.

this latter decision, the Arbitrator acknowledged both that the Union had actual notice of the Company's assignment of Zimmer throughout the period and that the Union had, during the course of the negotiations for the 1965 master agreement, unsuccessfully sought to obtain a Painter classification in the contract. Indeed the Arbitrator recognized that the Union's demand for a Painter classification had led to a compromise by the parties which resulted in the establishment of the classification "Painter (Spray Gun Only)." Furthermore, while concluding that "the 30-day limitation of both the 1962 and the 1965 contracts was tolled until knowledge or information was received by the Union which would have the effect of putting the Union on notice" and further stating that "[t]his knowledge was not received until the early part of 1966 when the grievance here under consideration was filed," it is clear from the Arbitrator's decision that the "knowledge" of the Union as to the nature and extent of the painting work performed by Zimmer was exactly the same at the time the grievance was filed as it was during the entire time that Mr. Zimmer was engaged in painting (R. 58).

On February 17, 1967, the Company made a motion to the Arbitrator for a vacation of his opinion and award as exceeding his authority. This motion was subsequently

denied on April 3, 1967 by the Arbitrator as being beyond his authority to grant.

F. The District Court Proceeding.

On April 11, 1967, the Company brought an action under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, in the United States District Court for the Northern District of California to set aside or appropriately modify or correct the award. On May 19, 1967, the Union filed a motion for an order confirming the Arbitrator's award.

On July 6, 1967, a hearing was held before United States District Judge Lloyd H. Burke on the motions made by the respective parties. At the opening of the hearing on the motion to vacate the Arbitrator's award and the countermotion to confirm that award, the court announced:

> "It is my tentative conclusion that there is really only one questior before this Court despite the fact that possible argument is offered in other areas. The issue, as I see it, is whether or not the arbitration proceedings, in and of themselves, confer jurisdiction on the arbitrator and, if he didn't have it to start with, did it acquire as a part of the acquiescence of the parties in allowing the arbitration to proceed to what amounted to a final determination of the issues. If there was jurisdiction in the arbitrator, I think that ends the

case once and for all."[13]

In the course of the argument on the respective motions, the court announced its view of the standards applicable to suits to set aside an arbitration award.

> "THE COURT: When you come back here, you are going to be stuck with the general proposition that unless the arbitrator has been so arbitrary in his function and unreasonable as to also equate his actions with deliberate dishonesty, it must stand whether the trial court would regard the results as patenly [sic] unreasonable or improper.
>
> . . . .
>
> THE COURT: I am pretty much of the opinion, Mr. Davis, that unless you can establish that the arbitrator had his hot little hands out to receive a bribe, that's about as far as you need go. There is almost unlimited power in the arbitrator once the parties have submitted to him for arbitration."[14]

Applying the above standard, the court granted the defendant Union's motion to confirm the Arbitrator's award. On August 4, 1967, the Company filed its notice of appeal.

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13. Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers International Union, AFL-CIO, et al., No. 46870 (N.D. Calif. July 6, 1967) (Ct. Tr. 1-2).

14. Id. at 34-35, 48.

III

ARGUMENT

The District Court Erred in Refusing to Set Aside or Appropriately Modify the Arbitration Award and in Granting an Order Confirming the Award.

A. The Applicable Judicial Authority.

In Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957), the Supreme Court held that Section 301 of the Labor-Management Relations Act "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements." Id. at 451. In holding that Section 301 conferred authority on federal courts "to fashion a body of federal law" in the enforcement of the contractual commitments embodied in collective bargaining agreements, the basic contribution of the Court's decision to the body of developing federal law was the establishment of the principle that agreements to arbitrate grievance disputes could be specifically enforced by a federal court despite the provisions of the Norris-La Guardia Act. While

Lincoln Mills was a necessary first step in formulating federal law in this area, it left unanswered a number of important questions. Thereafter, in Charles Dowd Box Co., v. Courtney, 368 U.S. 502 (1962), the Court held that such suits could be maintained under Section 301 in state courts as well as in federal courts. In Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962), it was decided that federal labor law principles apply whether the suit is commenced in a federal or in a state court.

The Supreme Court's decision in Lincoln Mills left largely unresolved the role to be played by the judiciary in actions involving the parties' agreement to arbitrate disputes. In the now famous Trilogy cases,[15] the court focused on this problem. Two of the Trilogy decisions, the American Mfg. Co. case and the Warrior & Gulf case, involved suits to compel arbitration. In both cases the defense raised was that the matter for which arbitration was sought was not encompassed by the grievance and arbitration provisions of the particular collective

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15. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

bargaining agreement; that is, that the matter was "non-arbitrable" under the contract. In reversing the decisions of the courts of appeals in these two cases which had held that the matters presented for arbitration were not arbitrable, the Supreme Court, in essence, decided that the so-called Cutler-Hammer doctrine[16] was not to become part of the body of federal substantive law applicable to suits to compel arbitration under Section 301. In Cutler-Hammer, the New York court had held that "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration."[17] In short, the Supreme Court held in American Mfg. Co. and Warrior & Gulf that even though under the substantive provisions of the contract an arbitrator could only correctly decide the merits of the dispute in favor of the party resisting arbitration, such a determination was not sufficient to foreclose arbitration of the matter. Arbitrability of a dispute as a threshold question was thus, in the Court's view, dependent

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16. International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317, aff'd per curiam, 297 N.Y. 519, 74 N.E.2d 464 (1947).

17. 67 N.Y.S.2d at 318.

upon the scope of the grievance and arbitration commitment between the parties. The court recognized, however, in its companion decision in Enterprise Wheel that challenges to the validity of an award, following the exhaustion of the arbitration process, involved different considerations.

While in effect holding that courts should be wary of foreclosing resort to arbitration, the Court was careful to note that even where the suit was one to compel arbitration of a dispute under the contract, the question of whether the matter was "arbitrable," i.e., encompassed by the agreement to arbitrate, was a matter for judicial determination.[18] Thus, as Mr. Justice Douglas, writing for

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18. Subsequent decisions of the Supreme Court have fully resolved all possible debate relating to the courts' role and scope of authority over questions of arbitrability. The arbitrability of a dispute is for judicial determination. "[W]hether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964). Further, the federal courts are unanimous in holding that a party preserves his right to challenge judicially the arbitrator's authority by raising his objections to the arbitrability of the dispute in the hearing before the arbitrator. E.g., Local 719 Bakery & Confectionery Workers v. National Biscuit Co., 378 F.2d 918, 921 (3d Cir. 1967); District 50, UMW v. Pittston Co., 210 F. Supp. 781, 786 (N.D. W. Va. 1962).

the Court, stated in the Warrior & Gulf case:

> "The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . ." 363 U.S. at 582.

Similarly, Mr. Justice Brennan in his concurring opinion in these cases pointed out:

> "To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is 'arbitrable' is inescapably for the court." 363 U.S. at 570-71.

In the same concurring opinion, Justice Brennan pointed out that arbitration provisions vary substantially from contract to contract and that obviously "the parties are free to make that promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include such promises in their agreement." Id. at 570.

In the third case of the Trilogy, United Steelworkers v. Enterprise Wheel & Car Corp., supra, the court was faced with a different question, namely, the authority of a district court when confronted with a suit under Section 301 to enforce an arbitration award. Here, the defendant had resisted the award and defended the action

on the ground that the award exceeded the arbitrator's authority under the contract. While concluding, in disagreement with the court of appeals, that the arbitration award was consistent with the authority conferred by the contract, the Court quite carefully noted that had the arbitrator exceeded his contractual authority, the Court would have had no choice but to refuse enforcement. Thus, the Court stated (363 U.S. at 597):

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

The Court in the Trilogy cases thus drew a distinction between the jurisdiction of the arbitrator to hear the case and his authority under the contract to render a particular award. Both the nature of this distinction and its rationale were the subject of a discerning article by Judge Paul R. Hays of the United States Court of Appeals for the Second Circuit, who for many years prior to his elevation to the bench was a recognized scholar in the labor relations field as well as a distinguished arbitrator.

Writing in 74 Yale Law Journal 1019, 1020-21 (1965),[19] Judge Hays stated in pertinent part:

> "The Court of Appeals for the Second Circuit has clearly drawn the distinction between arbitrability, that is, the arbitrator's 'jurisdiction' to hear the case, and the subsequent action for enforcement of his award. The court held that certain limiting language in a collective agreement went not to the arbitrator's 'jurisdiction' but to his 'authority' to make an award.
>
> Should his decision or the remedy exceed the bounds of his authority as established by the collective bargaining agreement, that abuse of authority is remediable in an action to vacate the award.

In United Steelworkers v. American Manufacturing Company, the first of the 1960 trilogy, the Supreme Court said that even a frivolous claim is arbitrable because of the 'therapeutic values' in the processing of all claims. This does not mean, though, that an award based on a frivolous claim is enforceable in the courts. In New Bedford Defense Products Div. v. Local 1113, UAW, a First Circuit case which is cited with approval in American Manufacturing, the district court held an issue arbitrable although it could be 'correctly decided only one way.' The appellate court likened the jurisdiction of an arbitrator to that of a court and said:

> If the subject matter of a claim is within the court's jurisdiction, the court does not

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19. This article entitled "The Future of Labor Arbitration" was originally the third of the Storrs lectures on Jurisprudence delivered by Judge Hays at the Yale Law School in November 1964. These lectures have since been collected and published as a volume entitled "Labor Arbitration: A Dissenting View" (Yale University Press 1966).

lose its jurisdiction because of the fact that the proper disposition of the claim may be crystal-clear under the law.

Holding that such an issue is arbitrable does not mean, I think, that an arbitrator's award should be enforced if he decided the issue in favor of the claim. In the words of the Second Circuit, the arbitrator has jurisdiction to be wrong. The question is whether he has authority to decide issues contrary to the provisions of the contract.

The point I make may be illustrated by supposing a collective bargaining agreement which provides: 'The employer shall have unfettered discretion under all circumstances, and as if no collective bargaining agreement existed, to contract out whatever work he chooses.' The union raises a grievance concerning the employer's having contracted work out. Under the authorities it appears that the grievance is arbitrable if the union claims that it arises under the agreement. Now let us suppose that the arbitrator awards in favor of the union and writes an award in which he says 'I have disregarded the contractual provision because I believe it to be unfair and inequitable. I have preferred to dispense my own brand of industrial justice which appears to me to be superior to the collective bargaining agreement.' His award, says the Court, 'is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.' The arbitrator would have jurisdiction to arbitrate the issue, but no authority under the collective agreement to make such an award. Nor can it be that the result depends on what the arbitrator says in his opinion. Suppose instead of announcing that he was disregarding the contractual provision he stated that he read it to prohibit all contracting out. Surely he would be equally faithless to his obligation. Or he might say nothing about the contract provision or even write no opinion. Has he not equally exceeded his authority?" (Footnotes omitted.)

As Judge Hays aptly stated in the foregoing article, "No great harm is done by applying a liberal rule as to arbitrability, if the court carefully scrutinizes what the arbitrator later decides." Id. at 1019.

B. The Arbitrator exceeded his authority under the contract by requiring the establishment of a Painter classification under the current collective bargaining agreement and in effect providing such a classification under the expired master contract.

1. By adding a job classification covering painting work in general to the current contract, the Arbitrator amended and modified that contract in direct violation of the express restrictions imposed on his arbitral authority by the contract and in obvious contravention of the ultimate agreement reached by the parties in their negotiations.

It is clear from the foregoing section and the decisions cited infra that the court below applied an erroneous standard in considering appellant's application to set aside or appropriately modify the arbitration award involved in this proceeding. These decisions do not delegate to the Arbitrator the right to determine his authority under the contract. On the contrary, it is clear that the scope of the Arbitrator's authority is a matter for judicial decision. Nor do these cases hold that "just about everything

goes once it [the dispute] gets to arbitration." (Ct. Tr. 35.) And most assuredly judicial inquiry is not limited to those instances where the arbitrator has been deliberately dishonest or has accepted a bribe (Ct. Tr. 34-35, 38). As we now show, the proper judicial standards which should be applied in such cases require that the Arbitrator's award be set aside, at least to the extent that the award established a Painter classification under the present contract and, in effect, provided for a Painter classification under the expired agreement. This result is required because the Arbitrator's authority to render such an award was excluded by both contracts.

In Torrington Co. v. Metal Prods. Workers Union, Local 1645, 362 F.2d 677 (1966), the Court of Appeals for the Second Circuit, applying the foregoing principles, set aside an arbitration award in a context nearly identical to the situation presented in the matter before the Court. In Torrington the company had a 20-year-old policy of permitting employees time off with pay to vote on election days. In its newsletter of December 19, 1962, the company announced that it was discontinuing this policy. Although the union representing the employees did not attempt to arbitrate the company's unilateral withdrawal of this longstanding benefit,

it filed an unfair labor practice charge with the National Labor Relations Board charging that the unilateral change of the election day policy constituted a violation of the Labor-Management Relations Act. The unfair labor practice charge was subsequently dropped by the union.

In August 1963, the parties began negotiations for a new contract. At the outset of those negotiations the company notified the union that it would no longer grant paid time off for voting. The union responded by including in its contract demands a written proposal for a provision in the contract which would grant employees time off for voting. The union's demands, including this proposal, were presented at a negotiating meeting held in August or September. Thereafter the parties were unable to reach agreement on a new contract and a long strike ensued. During the strike a number of the employees continued to work. None of these employees, however, were given time off to vote in the 1963 election.[20/]

The company refused to accede to the union's demand that the contract contain a provision granting

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20. Apparently no election had taken place from the time of the company's announcement in December 1962 until the 1963 election.

employees time off for voting. As the court noted in its opinion, the union's proposal for the inclusion of this benefit was a bargainable matter. (362 F.2d at 682.) Although the record was admittedly "somewhat unclear as to the circumstances surrounding the negotiations," the union's demand for this benefit was not included in the contract which was eventually signed in January of 1964. (362 F.2d at 678.) When the company refused to allow employees time off for voting in the 1964 election, the union promptly filed a grievance alleging that the company's action violated the contract and sought arbitration of the dispute.

In his award the arbitrator, after deciding that the dispute was arbitrable under the contract, concluded as follows (362 F.2d at 679):

> "[T]he benefit of paid time off to vote was a firmly established practice at Torrington, that the company therefore had the burden of changing this policy by negotiating with the Union, and that in negotiations which culminated in the current bargaining agreement the parties did not agree to terminate this practice. Finding further that this employee benefit was not within management's prerogative under the management function clause of the contract, the arbitrator held that the employees who took time off to vote on November 3, 1964, or who worked on that day and had received an election benefit in 1962 must be paid a comparable benefit for election day in 1964." (Footnote omitted.)

The company thereupon brought an action in the United States District Court for the District of Connecticut

to vacate the award. The District Court (T. Emmett Clarie, J.) entered an order setting aside the award based on its determination that the arbitrator "had exceeded his authority by reading the election day benefit into the new contract after the parties had negotiated the issue but had made no such provision in that contract." (362 F.2d at 677.) On appeal, the Court of Appeals affirmed the District Court's decision.[21/]

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21. The Torrington decision represents the fourth court of appeals to recognize the rapidly expanding body of decisional law holding that an arbitrator's award which is not supported by the contract, or which is contrary to an express limitation on the arbitrator's authority, should not be enforced. H. K. Porter Co. v. United Saw, File & Steel Prods. Workers, 333 F.2d 596 (3d Cir. 1964); Truck Drivers Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964); Textile Workers Local 1386 v. American Thread Co., 291 F.2d 894 (4th Cir. 1961). Similarly, a court of appeals will refuse to enforce an arbitrator's award if the arbitrator has decided issues other than those submitted to arbitration by the parties, e.g., Kansas City Luggage & Novelty Workers v. Neevel Luggage Mfg. Co., 325 F.2d 992 (8th Cir. 1964); Local 791, IUE v. Magnavox Co., 286 F.2d 465 (6th Cir. 1961), or when his decision requires one party to violate a state or federal statute, Glendale Mfg. Co. v. Local 520, ILGWU, 283 F.2d 936 (4th Cir. 1960), cert. denied, 366 U.S. 950 (1961); Puerto Rico Dist. Council of United Bhd. of Carpenters v. Ebanisteria Quintana, 56 L.R.R.M. 2391 (D.P.R. 1964).

    Finally, even in suits to compel arbitration which resulted in an order to arbitrate, the courts have cautioned that enforcement of the resultant arbitral award will not be granted if the arbitrator goes beyond his authority in making his award. E.g., Carey v. General Elec. Co.,

In reaching its decision, the Court of Appeals relied on the fact that the arbitration provision in the collective bargaining agreement between the company and the union limited the arbitrator's authority by providing that he "shall have no power to add to, delete from or modify, in any way, any of the provisions of this agreement." Id. at 678 n.2. Based on this provision and upon the history of the collective bargaining negotiations wherein the union had sought unsuccessfully to have this benefit added to the contract, the court concluded that the union was seeking to obtain by arbitration the very benefit which it had been unable to obtain during the course of negotiations. Thus, as Chief Judge Lumbard stated in the court's opinion (362 F.2d at 681-82):

> "While it may be appropriate to resolve a question never raised during negotiations on the basis of prior practice in the plant or industry, it is quite another thing to assume that the contract confers a specific benefit when that benefit was discussed during negotiations but omitted from the contract.
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> > '[I]n entering into a collective agreement, in the negotiations for which as much care and deliberateness were exercised in respect to the omission as to the inclusion of various restraints and

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(footnote 21 cont'd)

315 F.2d 499, 508 (2d Cir. 1963); International Ass'n of Machinists v. Hayes Corp., 296 F.2d 238, 242-43 (5th Cir. 1961); Lodge No. 12, IAM v. Cameron Iron Works, Inc., 292 F.2d 112, 118 (5th Cir. 1961).

obligations, neither party agreed to submit to an arbitrator the question of whether it should be subjected to the very restraint or obligation which in negotiations the parties, by omitting it from the contract, agreed the contract should not subject it to.' Freidin, supra note 4, at p. 12.

. . . .

In light of this uncontroverted fact, and bearing in mind that the arbitrator has no jurisdiction to 'add to' the 1964 agreement, we do not think it was proper to place the 'burden' of securing an express contract provision in the 1964 contract on the company. At the start of negotiations, Torrington announced its intent to continue its previous change of election day policy. This was an express invitation to the Union to bargain with respect to this matter. After the Union failed to press for and receive a change in the 1964 agreement, the company was surely justified in applying in November 1964 a policy it had rightfully established in 1962, and had applied in November 1963 (during the strike).

In our opinion, the Union by pressing this grievance has attempted to have 'added' to the 1964 agreement a benefit which it did not think sufficiently vital to insist upon during negotiations for the contract which ended a long and costly strike. We find this sufficiently clear from the facts as found by the arbitrator to agree with the district court that the arbitrator exceeded his authority by ruling that such a benefit was implied in the terms of that agreement." (Emphasis added.)

A comparison of the situation involved in Torrington and the instant case discloses that the issues presented to the Court of Appeals for the Second Circuit and the issues presented to this Court are nearly identical in all respects.

Indeed, we submit, the instant case presents more compelling reasons for setting aside the Arbitrator's award.

Unlike Torrington, where the matter in dispute had been for some 20 years a benefit enjoyed by employees, here the painting work at Holly's factories had never been compensated for at the Technician A rate even though such work was performed from the time the factories were built. Furthermore, in Torrington, as the court acknowledged, "the record [was] somewhat unclear as to the circumstances surrounding the negotiations." (362 F.2d at 678.) Indeed, a reading of the opinion reveals only the following with respect to the negotiations concerning this 20-year-old benefit: the union had made a written contract demand for voting time off; the company rejected this demand, and thereafter the new contract did not expressly provide such a benefit. Based on this sequence of events, and adopting the district court's reasoning that "labor contracts generally affirmatively state the terms which the contracting parties agree to,"[22/] the Court of Appeals concluded that time off for voting had not been part of the parties' ultimate agreement. 362 F.2d at 681-82.

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22. 362 F.2d at 679.

While we concur that the bargaining history in Torrington necessitated the court's ultimate determination and furnished an adequate basis for setting aside the award, we submit that the history of the 1965 negotiations with respect to the Union's demand for a Painter classification is, unlike Torrington, both clear and undisputed. Therefore, a similar result is even more persuasively compelled. During the subcommittee meetings held between Company and Union representatives, the Union initially demanded that a classification covering all painting work be added to the contract. This demand was consistently rejected by the Company. Thereafter, a proposal was made to add a classification covering merely spray painting work. Initially, the Company accepted this proposal upon the condition that the rate be paid only for that spray painting work performed in excess of four hours in a day. The Company's proposed limitation on the payment of the Technician A wage rate for spray painting was rejected by the Union. The Company thereafter agreed to remove the four-hour limitation. Thus, the final agreement of the parties with respect to the Union's demands relating to painting and spray painting work was that a job classification in the Technician A wage rate would be established which would be applicable to spray painting only, without any minimum work time limitation.

This understanding was embodied in the final contract agreed to by the parties by adding the designation "Painter (Spray Gun Only)."

In sum, the undisputed history of the collective bargaining negotiations in 1965 which led to the inclusion in the current master agreement of the work classification "Painter (Spray Gun Only)" leaves no doubt that the parties agreed that no general overall Painter classification would be included in the collective bargaining agreement. For not only was the Union's initial demand rejected, as in Torrington, but here the record clearly reveals both the process by which the parties compromised their differences and the exact nature of that compromise. Furthermore, the resulting contract not only failed to include the Union's demand, as was the case in Torrington, but in fact included a clause setting forth the compromise reached in the negotiations. The contract thereby embodied the full extent of the parties' agreement. In these circumstances, there can be no doubt that in requiring a Painter job classification to be added to the current contract, the Arbitrator violated the express contractual interdiction against amending or modifying the agreement. Accordingly, this Court must set aside the

award.[23]

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23. Even prior to the Second Circuit's decision in Torrington, this court held that in determining the authority conferred upon the arbitrator, the collective bargaining agreement must be "construed in the light of bargaining history between the parties and the interpretations placed on the contract by the parties." Communications Workers v. Pacific N.W. Bell Tel. Co., 337 F.2d 455, 456 (9th Cir. 1964); see Pacific N.W. Bell Tel. Co. v. Communications Workers, 310 F.2d 244 (9th Cir. 1962), reversing and remanding 199 F. Supp. 689 (D. Ore. 1961). This case involved a suit for declaratory judgment by the Company that it had no obligation under the terms of the collective bargaining agreement with the union to arbitrate its action in imposing the discipline of suspension upon an employee. The issue before the district court was whether an arbitrator had authority to entertain a grievance relating to a disciplinary suspension by the company. The district court initially concluded that under the terms of the contract the employer was required to arbitrate the matter. 199 F. Supp. 689 (D. Ore. 1961).

On appeal this court reversed on the basis of its determination that the court below had erred by limiting its consideration of the arbitrator's authority to a review of the terms of the contract, thereby excluding the company's proferred evidence with respect to the bargaining history of the agreement. In offering this evidence, the company sought to establish that disciplinary suspensions were excluded from the grievance and arbitration procedure of the contract. In reversing the district court, this court stated:

> "The [bargaining] history discloses that the union unsuccessfully attempted to secure a provision expressly including disputes relating to disciplinary suspension within the reach of the arbitration clause.
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> This evidence then went to the judicial issue and not to the merits. It was error

2. By, in effect, establishing a job classification encompassing all painting work under the agreement which had expired on March 1, 1965, and granting relief under that agreement, the Arbitrator violated the contractual restrictions on his authority contained in both contracts, which expressly limit his authority to make an award to matters "which arose and are presented during the term of this contract and which concern the interpretation or application of any of the terms of this contract."

We now turn to a consideration of the second aspect of the Arbitrator's award and show that in establishing a

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(footnote 23 cont'd)

to exclude it from consideration." 310 F.2d at 249.

On remand the district court concluded that the collective bargaining contract, construed "in light of the bargaining history between the parties," did not obligate the company to submit to arbitration disciplinary suspensions. 337 F.2d at 456. On further appeal to this court, the union claimed that it was error to consider the bargaining history in determining the scope of the arbitrator's authority under the contract and requested that the court re-examine and reverse its earlier decision. After reviewing a number of decisions, including the Supreme Court's decisions in the Trilogy cases, this court affirmed its earlier opinion, stating that it could not "square" the position urged by the appellant union with the Supreme Court's holdings in the Trilogy cases. As this Court stated in its second decision (337 F.2d at 459):

> "The very nature of a collective bargaining agreement requires that it be read in the light of bargaining history and the history of the parties' own interpretation. A new technical

Painter classification and in granting relief under the old contract, the Arbitrator further exceeded his authority under both agreements. As already noted, both the prior contract and the present agreement contain identical grievance and arbitration provisions. Under both contracts, the Grievance Committee is restricted to considering only matters "which arise and are presented during the term of this contract and which concern the interpretation or application of any of the terms or provisions of this contract" (emphasis added). Furthermore, the Arbitrator is empowered to consider only those unresolved grievances "which arose and are presented during the term of this contract and which concern the interpretation or application of any of the terms of this contract" (emphasis added). It is significant that the parties, knowledgeable in the drafting of collective bargaining agreements, twice placed in their contract the dual limitation that only

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(footnote 23 cont'd)

> rule of evidence which would render incompetent parol evidence of a party's intent would seem peculiarly inappropriate in the area of collective bargaining." (Footnotes omitted.)

See also cases cited in this Court's second opinion, 337 F.2d at 458 n.2.

those grievances arising and presented during the term of the agreement and involving the interpretation and application of the particular agreement could be presented to the Grievance Committee and thereafter be submitted to arbitration. It would be difficult to phrase in clearer language a more explicit limitation on the Arbitrator's authority.

Applying these jurisdictional provisions to the award, it is evident that disputes which arose during and concerned the prior agreement could not be entertained by the Arbitrator. Specifically, the question of whether the Company may have violated the prior contract by failing to establish a Painter work classification was placed beyond the Arbitrator's domain by these express exclusionary provisions. Accordingly, the Arbitrator's award, to the extent that it in effect established a job classification with respect to painting work under the prior contract exceeded his authority under both agreements.

In reaching this aspect of his decision, the Arbitrator concluded that in assigning Zimmer to painting work in March 1964, the Company "established a new position or job classification of painter." (R. 56.) The Arbitrator then concluded that by failing to post this "new job," the Company violated Section VIII-G of the contract and that this failure to post somehow prevented the Union from

learning that Zimmer was performing painting work. On the basis of this alleged lack of "notice," the Arbitrator determined that all limitations and restrictions in both contracts on his decisional authority were "tolled" until "knowledge or information was received by the Union which would have the effect of putting the Union on notice." (R. 57-58.) Coincidentally and without further explanation, the Arbitrator then found that "[t]his knowledge was not received until the early part of 1966 when the grievance here under consideration was filed." (R. 58.)

Apart from the contractual limitations on the Arbitrator's authority discussed previously, and the obvious contractual misconstructions discussed below, it is sufficient answer to the Arbitrator's effort to "revisit" the old contract to point out, as the Arbitrator himself acknowledged in his decision, that from the very outset of the assignment the Union and, of course, Zimmer, were fully aware that he was engaged in painting work throughout the factory. Assuming arguendo that the posting of a Painter job at the time of Mr. Zimmer's assignment, or shortly thereafter, would have given the Union notice of that assignment, it is inescapably true, as the Arbitrator himself found, that the Union had actual notice of the painting work being performed by Zimmer from the outset of

his employment (R. 55). Furthermore, in his decision, the Arbitrator found that actual knowledge or information of Zimmer's painting activities would be sufficient to place the Union on notice of the Company's action. In view of the fact that the Union obviously had such notice throughout the period of Zimmer's employment, the Arbitrator's finding, without so much as a supporting sentence, that this actual notice was not received "until the early part of 1966 when the grievance here under consideration was filed" is totally inexplicable. It is obvious that the Union's knowledge on the subject in 1966 was no different from the knowledge which it had beginning with the assignment of Zimmer to painting work in 1964. In fact, there was no change in the Union's knowledge in 1966; the only change was a turnover in the officers of the Union when Mr. Neff replaced Mr. Duncan as the Local's president.

Although it may be difficult to understand why the Union chose not to invoke Section XVII-2 of the contract during this period, the fact remains that it obviously made such an election. For whatever its reasons may have been, the Union apparently decided that it would have a better opportunity to obtain a Painter classification in the negotiations for the new master contract that were to be held the following spring. Indeed, at these negotiations the demand for such a classification was supported, not only

by claims that painting work was being performed at Carlton, but also that two men were engaged full time in painting at the Santa Ana factory. That the Union was unsuccessful in its efforts to obtain a Painter classification in the current contract clearly does not furnish a basis for the establishment of such a classification under the prior contract but, on the contrary, further demonstrates the necessity for setting aside that aspect of the Arbitrator's award.

In short, it is clear from the face of the Arbitrator's opinion that the Union knew that Zimmer was performing painting work throughout his employment. Furthermore, the Arbitrator expressly found that such "knowledge or information" had "the effect of putting the union on notice" (R. 57-58). In these circumstances, the Arbitrator's conclusion that the contractual restrictions imposed on his authority were "tolled" is not only baseless but, indeed, totally inconsistent with his own analysis and decision.

Finally, we submit that the Arbitrator's ultimate determination that he had authority to award relief under the expired contract proceeds from an erroneous interpretation of the purpose and effect of Section VIII-G of the contract and from a misconception of the nature of any possible violation that may have resulted from the assignment of Zimmer to painting work, assuming <u>arguendo</u> that such a violation occurred. The purpose of Section VIII-G, set as it is in the

seniority provisions of the contract, is readily apparent. The section was designed to give notice to employees of vacancies in existing job classifications so that they might utilize their seniority standing and ability in an effort to obtain more favorable positions. This is not to say that the provision has no application where the assignment of substantial new duties may result in the creation of a new job. In this latter situation, however, Section VIII-G is clearly subservient to the requirements of Section XVII-2. Section XVII-2 provides:

> "New Jobs. In the event any new jobs are created, the work classifications and wage rates therefor shall be negotiated by the Employer and the Union, provided, however, should the parties fail to agree on the work classifications and wage rates for any such new jobs, the Employer shall have the right to fill such new jobs and fix the work classifications and wage rates therefore, subject to the Union's right to refer the matter of the work classifications and wage rates of such new jobs to normal grievance procedure." (R. 12 [33].)

It is thus manifest that, with respect to a newly created job, the posting requirements of Section VIII-G become operative only after the Company and the Union have, following negotiations, reached agreement upon a new work classification and wage rate or, absent agreement, the Company exercises its right under the provision to establish the appropriate classification and wage rate subject, of course, to the Union's correlative right to grieve about the

Company's action.

Here, of course, the Company believed, in good faith, that the assignment of painting work to Zimmer was consistent with the classification of Mechanic's Helper to which he had been assigned.[24/] The Union apparently viewed the assignment quite differently. It was therefore, we submit, incumbent upon the Union to invoke Section XVII-2 and request the Company to negotiate concerning the establishment of a painter classification and an appropriate wage rate. If the Company had declined to meet with the Union about the matter, the Union was free to utilize the grievance and arbitration provisions of the contract to remedy such an obvious contract violation.

Assuming that the parties had negotiated about the matter pursuant to the provisions of Section XVII-2, but were unable to reach an accord, the Union was entitled under that Section to grieve and arbitrate about any adverse action by the Company. Here, as noted by the Arbitrator, although the Union was aware of Zimmer's work assignment, it never sought negotiations concerning the establishment of a painter classification nor did it resort to the grievance procedure

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24. As noted supra, painting work had traditionally been performed as an intercampaign maintenance task by year-round employees. Furthermore, Zimmer was assigned to other work in June 1966 when "the company had fairly well completed its painting program." (R. 53.)

set forth in the contract within the 30-day time limitation or indeed at any time during the remaining year of the contract. It is this failure, among others, of the Union to follow the requirements of the grievance procedure of the collective bargaining agreement which precluded the Arbitrator from hearing its claim on the merits and which requires the setting aside of the award by this Court.

In sum, it is clear that the Company's failure to post the fact that Zimmer had been assigned to painting work did not violate any notice or other provision of the contract. Indeed, the very assignment itself carried out, as the Arbitrator found, in an open and notorious fashion, constituted sifficient notice to the Union to enable it to invoke the provisions of Section XVII-2. This was the provision of the contract to which the Union should have resorted, if it believed, contrary to the Company's conclusion, that the tasks assigned to Zimmer had resulted in the creation of a "new job." The Union, however, failed to avail itself of this provision. Therefore it is clear that the Company's action violated neither Section VIII-G nor any other provision of the contract. In these circumstances, not only was there no basis upon which the Arbitrator could "revisit" the expired agreement, but, indeed, there was no justification for finding that the Company had violated any provision of that agreement.

In conclusion, we submit that the Arbitrator's award, at least to the extent that it requires the establishment under the present contract of an overall job classification covering painting work in general and, in effect, created such a classification under the prior contract well after its expiration, is in clear excess of the Arbitrator's authority under both contracts and must necessarily be set aside. This suit is not, as suggested by appellee below, an attack on the arbitral process. Nor would a decision by this Court granting the foregoing relief have a deleterious effect on labor arbitration. On the contrary as stated by Judge Lumbard in Torrington (362 F.2d at 682):

> "Far from having the disruptive effect upon the finality of labor arbitration which results when courts review the "merits" of a particular remedy devised by an arbitrator, we think that the limited review exercised here will stimulate voluntary resort to labor arbitration and thereby strengthen this important aspect of labor-management relations by guaranteeing to the parties to a collective bargaining agreement that they will find in the Arbitrator not a 'philosopher king' but one who will resolve their disputes within the framework of the agreement which they negotiated."

IV

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue reversing the judgment below and remanding the case to the District Court with instructions to set aside that segment of the Arbitrator's award relating to the establishment of an overall painter classification with respect to both the present and past collective bargaining agreements.

Dated: February 23, 1968.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 +39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ JAMES C. PARAS
James C. Paras

APPENDIX A

The following is a list of sixteen jobs found among the work classifications appearing in the current master contract showing the different pay rates which were assigned to such jobs at diffefent factories (R. 12 [38-73]):

Legend:
H = Holly Sugar Corporation
S = Spreckels Sugar Company
AC = American Crystal Sugar Company

	Job Title	Class	Plant	
1.	Liquid Sugar Operator (invert)	Tech B	Alvarado	H
	" " "	Tech A	Santa Ana	H
	Liquid Sugar Station Operator	Tech B	Spreckels	S
	" " " "	Sta. A	Manteca	S
	" " " "	Sta. A	Mendota	S
	" " " "	Sta. A	Woodland	S
	Liquid Sugar Operator	Sta. A	Tracy	H
2.	Oiler	Tech C	Manteca	S
	"	Tech C	Mendota	S
	"	Sta. A-1	Spreckels	S
	"	Sta. A	Alvarado	H
	"	Sta. A	Carlton	H
	"	Sta. A	Hamilton City	H
	"	Sta. A	Santa Ana	H
	First Oiler (pumps)	Sta. A	Clarksburg	AC
3.	Pulp Drier Operator	Tech A	Woodland	S
	" " "	Tech C	Manteca	S
	" " "	Tech C	Mendota	S
	Pulp Drier Fireman	Sta. A	Alvarado	H
	" " "	Sta. A	Carlton	H
	" " "	Sta. A	Santa Ana	H
	" " "	Sta. A	Tracy	H
	Drier Fireman	Tech C	Spreckels	S
4.	Warehouse Checker	Tech C	Manteca	S
	" "	Tech C	Woodland	S
	" "	Sta. A	Spreckels	S

	Job Title	Class	Plant	
5.	Assistant Electrician	Tech B	Clarksburg	AC
	" "	Tech C	Alvarado	H
	" "	Tech C	Tracy	H
	" "	Tech C	Carlton	H
6.	Shift Chemist	Tech A	Spreckels	S
	" "	Tech B	Manteca	S
	" "	Tech B	Mendota	S
	" "	Tech B	Woodland	S
7.	Evaporator & Instrument Controller	Tech C	Carlton	H
	Evaporator Operator	Sta. A-1	Spreckels	S
	Evaporator	Sta. A	Manteca	S
	"	Sta. A	Santa Ana	H
	"	Sta. A	Tracy	H
	"	Sta. A	Woodland	S
8.	Gardener	Sta. B	Spreckels	S
	"	Sta. B	Woodland	S
	"	Sta. C	Clarksburg	AC
9.	Granulator	Sta. A	Manteca	S
	Granulator Operator	Sta. B-1	Spreckels	S
	Granulator	Sta. B	Alvarado	H
	"	Sta. B	Carlton	H
	"	Sta. B	Clarksburg	AC
	"	Sta. B	Hamilton City	H
	"	Sta. B	Santa Ana	H
	"	Sta. B	Tracy	H
	"	Sta. B	Woodland	S
10.	Knife Setter	Sta. A	All Plants except	
	" "	Sta. B-1	Spreckels	S
	Knife Station Operator	Sta. A-1	Mendota	S
11.	Centrifugal Operator	Sta. A	All plants except	
	"	Tech C	Mendota	S
		none	Manteca	S
12.	Vacuum Pan Helper	Sta. A	Tracy	H
	"	Sta. B	Hamilton City	H
	"	Sta. B	Manteca	S
	"	Sta. B	Santa Ana	H

	Job Title	Class	Plant	
13.	Slackerman [Slakerman]	Sta. B	Manteca	S
	"	Sta. B	Spreckels	S
	"	Sta. C	Carlton	H
	"	Sta. C	Hamilton City	H
14.	Weightmaster	Sta. A	Manteca	S
	"	Sta. A	Mendota	S
	Beet Weightmaster	Sta. A	Woodland	S
	" " (Factory Rec.Sta.)	Sta. A	Spreckels	S
	Weightmaster	Sta. B	Clarksburg	AC
15.	Sugar Piler & Loader	Sta. B-1	All 5 Holly plants	H
	Piler & Loader (Sugar and Dried Pulp)	Sta. B	Manteca	S
	"	Sta. B	Mendota	S
	"	Sta. B	Woodland	S
16.	Truck Driver	Tech C	Manteca	S
	"	Tech C	Woodland	S
	Yard Truck Driver	Tech C	Mendota	S
	Tare Lab. Sample Truck Driver	Tech C	Mendota	S
	Truck Driver (Sugar)	Tech C	Carlton	H
	"	Tech C	Hamilton City	H
	"	Tech C	Santa Ana	H
	"	Tech C	Tracy	H
	Truck Driver	Sta. B	Clarksburg	AC
	"	Sta. B	Spreckels	S
	Supply Truck Driver	Sta. B	Alvarado	H
	"	Sta. B	Carlton	H
	"	Sta. B	Santa Ana	H
	"	Sta. B	Tracy	H
	Yard Truck Driver	Sta. C	Alvarado	H

SECTION XI. GRIEVANCE PROCEDURE:

A. Stewards and Workmen's Committee. The Union shall select such stewards as may be necessary to carry out the purposes of this Agreement. The Union shall select from it membership at each plant a committee of three to be known as the Workmen's Committee.

B. Grievances. Whenever any employee claims a grievance against Employer he shall notify the Workmen's Committee, which shall investigate the matter and report its findings to the Union. In the event the Union decides against the complainant the decision shall be final and binding, subject, however, to appeal to the Sugar Council and the International Union. In the event the Union, or, after appeal said Sugar Council or International Union, decides the grievance should be considered further, it shall be referred to the Grievance Committee. All grievances must be presented to Employer in writing, setting forth in detail the nature of the grievance and must be presented within thirty (30) days of the date of the alleged grievance. Otherwise said grievance will not be considered.

C. Grievance Committee. The Grievance Committee shall be composed of three (3) members selected by the Union and three (3) Employer members appointed by Employer. The Grievance Committee shall be empowered to adjust only those grievances of Union, members of the Union and Employer which arise and are presented during the term of this contract and which concern the interpretation or application of any of the terms or provisions of this contract in the manner hereinafter set forth.

D. Procedure. The Grievance Committee upon receiving notice that a grievance is to be submitted to it shall meet within three (3) days' time. Said committee shall make every effort to settle within five (5) days from the date of submission of each such grievance. Either the Union or Employer may, after exhausting the foregoing grievance procedure, submit any unresolved grievance which arose and was presented during the term of this contract and which concerns the interpretation and application of any of the terms or provisions of this contract to an arbitrator for decision in accordance with the following procedure:

There is hereby established a permanent panel of five impartial arbitrators; namely _____

_____, _____, _____ and _____. In any case, when the Union or Employer refers to arbitration an unresolved grievance which was presented in accordance with the above procedure, the arbitrator who shall hear such grievance shall be selected by lot from the foregoing panel. The decision of the arbitrator shall be in writing and shall be final and binding upon both parties. The expenses of arbitration shall be shared equally between the Union and Employer.

It is understood and agreed, however, that proposals to add to or change this contract shall not be arbitrable and that no proposal to modify, amend or terminate this contract may be referred for arbitration under this Section; and no arbitrator shall have any power to amend or modify this contract, except that in the event new jobs are created, the arbitrator shall in such event have the power to act as provided in Section XVII, subparagraph 2, of this contract.

E. Union Representatives. The Shop Steward, or Workmen's Committee, or Union representatives of the Grievance Committee, shall have the right to converse with employees while on the job, but no time shall thereby be unnecessarily lost to the Employer. Any other duly authorized representative of the Union, upon applying to the superintendent's office, shall be allowed a pass entitling him to check with members of the Workmen's Committee on the job at reasonable times for the purpose of investigating the performance of this agreement. This privilege shall be exercised so that no time is lost to the Employer. Any such pass shall cover one trip only at the specified time and must be surrendered upon completion of the trip. Any abuse of this privilege shall result in its being withdrawn by the Employer.